

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 17, 2007

STATE OF TENNESSEE v. ELMO J. BAKER, JR.

Appeal from the Criminal Court for Sumner County
No. 624-2005 Dee David Gay, Judge

No. M2006-02596-CCA-R3-CD - Filed December 4, 2007

The defendant, Elmo J. Baker, Jr., appeals from the Sumner County Circuit Court's probation revocation for his seven-year sentence for attempted aggravated sexual battery, a Class C felony. He claims that the trial court erred in revoking his probationary status and ordering him to serve his sentence in incarceration. We hold that the trial court did not abuse its discretion, and we affirm its judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

David Allen Doyle, District Public Defender, and Michael G. Anderson, Assistant Public Defender, for the appellant, Elmo J. Baker, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Sallie Wade Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant pled guilty and accepted a sentence involving split confinement of one year in jail with the balance of the seven-year sentence to be served on probation. After being released from jail, the defendant's probation supervision was transferred from Sumner County, the county of conviction, to Marshall County. According to the evidence of record, the transfer took place on May 11, 2006. A probation violation warrant was issued against the defendant on August 1, 2006, which alleged that he violated several rules of probation and "sex offender directives" by living in a home where there was internet access, by living in a home where a minor child visited, and by moving without having first obtained approval of the new residence.

At the revocation hearing, Sally Overbey, the defendant's Marshall County probation officer, testified that she met with the defendant on April 27, 2006, before his case was transferred to

Marshall County on May 11. She said she told him “[f]rom the very start” that she would not approve internet access in the home where he lived. She said that he lived with his mother and that there was internet access in her home in the defendant’s bedroom. She said that she discussed this with the defendant and that in a subsequent home visit on June 28, she observed that the computer still had internet access. She said that on that date, she discussed with the defendant and his mother that the internet must be disconnected. She said the defendant told her on July 7 that the internet was still connected.

Ms. Overbey testified that the defendant’s probationary terms prohibited him being around children. She said she was also aware from conversations with the defendant and his mother that the mother’s grandchild, who was a minor, visited the home. She said she told the defendant and his mother that this was contrary to the rules and that she told the defendant’s mother that she should visit her grandchild in another location.

Ms. Overbey testified that the defendant’s terms of probation required that he have any residence approved by his sex offender therapist and the probation staff before moving. She said that the defendant informed her on July 10 that he was seeking another residence and that she advised him he would need to have the residence approved before moving. She said she denied permission for the defendant to move to a new residence when she learned that the defendant planned to live with the mother of the child who was the victim of his conviction crime. She said the defendant updated his address on July 10 with the same address for which she had denied permission for him to move.

Ms. Overbey testified that as a result of the various violations, she requested that the defendant’s therapist perform a polygraph examination of the defendant, which is required at least two times per year. The trial court sustained defense objections to further testimony about the polygraph examination and to admission of a letter from the therapist.

Ms. Overbey acknowledged that the defendant reported twice a month as required and that he reported twice after the violation warrant was issued. She admitted that the defendant told her that there was internet access in his mother’s home, that he had had contact with a minor child, and that he wanted to move and later did so. She said she visited the defendant’s residence after he moved and did not observe minor children or internet access in the home. She said that when she got the defendant’s case, he was already living with his mother and that her file did not reflect whether someone had approved the defendant living at the residence before the case was assigned to her. She acknowledged that the defendant passed all the drug screenings that she administered and that he provided her with proof of employment.

Avana Sisco testified that she was employed by the Board of Probation and Parole in Sumner County and that she had performed the intake interview of the defendant on April 12, 2006. She said the defendant informed her that he planned to live with his mother, who had internet access. She said she told the defendant that “momma has to give us 24/7 access” or he would have to live elsewhere.

The defendant testified that he was released from jail on April 14, 2006, and that he went to his mother's home in Lewisburg. He said that his mother and stepfather lived at the residence and that his nephew, who was fifteen or sixteen years old, lived there "on the weekends and during the summer." He said he told the probation officers that his mother had internet access and that his mother would have allowed the officers to inspect the computer if she had been asked. He said his mother refused to have the internet service disconnected. He said his nephew continued to come to the home after his mother was advised that this was contrary to the defendant's probation rules. He said he attempted to stay away from the home when his nephew was there but that it was difficult to do so. He said he could not move to his father's home because there was no room for him. He said that he moved to another residence with his fiancée, Emily Crowder, in mid-July. He said no one else lived with him and Ms. Crowder and that no children visited the home.

The defendant testified that he maintained employment and reported to his probation officer as scheduled except for once when he had to go to the emergency room. He said he went to see his sex offender therapist weekly. He said he moved from his mother's home "[t]o keep from getting violated" due to the internet connection and his nephew's presence. He said that if he were given another chance, he would live with Ms. Crowder in a new location. He said there would be no internet access or children in the home. He said Ms. Crowder did not have custody of her children and had agreed to visit them outside the home. He said he thought he would still have his job. He said he would continue counseling.

The defendant admitted that Ms. Overbey told him he was not allowed to have internet access at his mother's house and that he moved to her house where there was internet access. He said his room in his mother's home was not really a bedroom and that other people had to walk through the room to get to the bathroom. He admitted that he moved despite Ms. Overbey's having told him she would not approve it.

Emily Crowder testified that she was the defendant's fiancée. She said she and the defendant lived together. She said that she did not have custody of her daughters and that neither of them would come to Marshall County to visit her. She said she had visited her younger daughter but that the older daughter, who is the victim in this case, refused to see her. She said she lived in a trailer on property the defendant had inherited and that there would be no internet access in the home if the defendant were allowed to live with her.

Ms. Crowder testified that the defendant could not have afforded to live somewhere other than his mother's home without pooling resources with her. She also stated that she was not employed.

At the conclusion of the hearing, the court found that the defendant had violated the rules of probation by living in a home with internet access, by having contact with a minor, and by moving to a residence that had not been approved. The court found that the defendant had been given a chance to abide by the rules but had failed to do so. The court stated, "When I have a probation officer that tells you to do something and you don't do it, that shows me you can't abide by any of the rules." The court revoked probation and ordered the defendant to serve his sentence in the Department of Correction.

A trial court may revoke probation upon finding by a preponderance of the evidence that the defendant has violated a condition of probation. T.C.A. §§ 40-35-310, -311(e). If the trial court revokes probation, it can “(1) order incarceration; (2) cause execution of the judgment as it was originally entered; or (3) extend the remaining probationary period for a period not to exceed two years.” State v. Hunter, 1 S.W.3d 643, 648 (Tenn. 1999). The decision to revoke probation is within the sound discretion of the trial court, and its judgment will be reversed only upon a showing of an abuse of discretion, reflected in the record by an absence of substantial evidence to support the trial court’s decision. State v. Gregory, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997).

Upon consideration, we hold that the trial court’s determination that the defendant had violated the terms of probation was supported by substantial evidence and that the trial court did not abuse its discretion in revoking his probation and ordering him to serve his sentence in prison. By his own admission, the defendant violated multiple terms of his probation. The defendant was advised of the rules of probation and although he complied with some of them, he remained in violation of others over a period of months without making satisfactory living arrangements which were in compliance with all of the rules. Although the defendant had successfully completed some of the probationary terms, a probationer is not allowed to select those terms with which he will comply and disregard the rest on the basis that he complied with some of them.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE